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No. 05-5224

IN THE
SUPREME COURT OF THE UNITED STATES

ADRIAN MARTELL DAVIS,

Petitioner

v.

STATE OF WASHINGTON,

Respondent.

On Petition for Writ of Certiorari to the
Washington Supreme Court

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The State's response to the petition for certiorari is a microcosm of the way prosecutors' offices across the country have met this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004): by kicking up dust. The State does not dispute that this Court's criteria for certiorari are met – this case unquestionably presents an important question of federal law – or even seriously defend the decision below; instead, the State manufactures and discusses numerous factual topics that have no relevance to the legal question at hand. Once these obfuscations are cleared away, it is plain that this Court should grant certiorari here. The pressing issue whether *Crawford* applies to accusations made to 911 operators should be resolved now – not years from now – and this case is an excellent vehicle for doing so.

A. The Conflict Over Whether "Excited Utterances" Describing Recent Criminal Activity To Governmental Agents Are Testimonial Continues To Deepen.

The State acknowledges that federal and state courts are divided over whether "excited utterances" to governmental agents describing recent criminal activity are testimonial. *See* Br. in Opp. at 1. In fact, after the petition for certiorari was filed, the Minnesota Supreme Court issued an opinion describing the three-way legal conflict exactly as the petition does: (1) some courts hold that such statements always are nontestimonial; (2) others analyze such statements on a case-by-case basis; (3) and still others hold that such statements are always testimonial. *See State v. Wright*, 701 N.W.2d 802, 810-11 (Minn. 2005).

What is more, during the three months since the petition for certiorari was filed, the split has deepened significantly, with new courts adopting all of these different approaches. The Eighth Circuit has adopted the first approach. *See United States v.*

Brun, 416 F.3d 703, 707-08 (8th Cir. 2005) (911 call and a statement to responding officers "were . . . excited utterances, and therefore nontestimonial statements").

The Minnesota Supreme Court, the North Carolina Supreme Court, and the Wisconsin Court of Appeals have adopted variants of the second approach. *See Wright*, 701 N.W.2d at 811 (911 calls, absent "an exceptional occasion," are nontestimonial; eight-factor test determines whether statements to responding officers are testimonial); *State v. Lewis*, ___ S.E.2d ___, 2005 WL 2467053, at *11-16 (N.C. Oct. 7, 2005) (adopting "case-by-case" approach under which police motives and objective declarant's state of mind are scrutinized; police's "initial gathering of information and determination of whether a crime has been committed" cannot produce testimonial statements); *State v. Hemphill*, 2005 WL 2139376, at ¶ 11 (Wis. App. Sept. 7, 2005) (publication decision pending) (case-by-case approach; statement to responding officers identifying assailant nontestimonial).

The Tenth Circuit and the Massachusetts Supreme Judicial Court have adopted the third approach, and the Kentucky Supreme Court has assumed that approach is correct. *See United States v. Summers*, 414 F.3d 1287, 1300-03 & n.9 (10th Cir. 2005) (adopting Sixth Circuit's holdings on subject; interview at scene of a "felony stop" testimonial); *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 555-59 (Mass. 2005) (adopting Sixth Circuit's holdings on subject; statements obtained during "preliminary fact gathering and assessment whether a crime has taken place" are "per se testimonial"); *Bray v. Commonwealth*, ___ S.W.3d ___, 2005 WL 2317014, *2-3 (Ky. Sept. 22, 2005) (accepting and applying Sixth Circuit's approach to excited utterances but finding

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statement nontestimonial because made to declarant's family member prior to any crime occurring).

Finally, the Third Circuit has adopted the second approach for statements in 911 calls and the third approach for statements to responding officers. *See United States v. Hinton*, ___ F.3d ___, 2005 WL 2218919, *5-6 (3d Cir. Sept. 14, 2005) (911 calls were not testimonial; statement to investigating officers was testimonial).[1]

One additional academic has weighed in as well, asserting that the third approach is the correct one. *See* Myrna S. Raeder, *Domestic Violence, Child Abuse, and Trustworthiness Exceptions After* Crawford, 20 Crim. Just. 24, 29 (Summer 2005) (under proper conception of *Crawford*, statements in 911 calls giving "the identity of the perpetrator or any information obtained as a result of questioning by the 911 operator would be viewed as testimonial").

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[1] The Third Circuit's decision supports the suggestion in the *amicus* brief filed by the Public Defender Service for the District Columbia and the NACDL that even if this Court grants certiorari in a case involving a statement to a responding officer, it also should grant certiorari in this case to give comprehensive guidance in this area of law. Although most courts have held that accusatory "excited utterances" to responding officers should be treated the same as those to 911 operators, some courts like the Third Circuit have suggested that even if statements to responding officers are testimonial, statements to 911 operators are not, or may not be. *See, e.g., People v. Packard*, 2005 WL 1745329, *4-5 (Cal. App. July 26, 2005) (not officially published) (not deciding whether statements to a responding officer were testimonial because 911 call was not testimonial and contents of that call were the same as the interview with the responding officer); *Pitts v. State*, 612 S.E.2d 1, 4-5 (Ga. App. 2005) (noting that state supreme court held statements to investigating officers are categorically "testimonial," but holding nonetheless that "911 calls . . . do not come within the ambit of *Crawford*"); *Wright*, 701 N.W.2d at 811-12 (analyzing statement to responding officer somewhat differently than 911 call). Because both kinds of statements are central to the modern practice of victimless prosecutions – and because so many state courts already have demonstrated, by limiting *Crawford*'s reach to police "interrogations," that they intend to read this Court's decisions in this area as limited strictly to their facts – this Court should not leave the status of accusatory statements in 911 calls unresolved.

In sum, there can be no doubt that the law in this area is in utter disarray. This Court is the only institution that can halt the escalating disorder.

B. There Is Nothing To Gain, And Much To Lose, By Delaying Consideration Of This Issue.

The only real argument the State advances in its opposition is that this Court should "deny the petition for certiorari, and others like it, [to] await a case wherein the trial court record was *fully* developed after *Crawford* was decided." Br. in Opp. at 2. The State does not point to any such case involving a 911 call pending in this Court, or even in any state supreme court or federal court of appeals. Nor is Petitioner aware of any. It is important, therefore, to understand what the State's request entails: Because a petition for certiorari must be filed in this Court by this November in order for the case to be heard this Term, the State is asking this Court to delay ruling on whether *Crawford* applies to accusations like the one here until the October 2006 Term, at the earliest. This would generate – again, at the earliest reasonable date – a decision on the issue by the winter of 2007, about one and one-half years from now.

Lower courts, defendants, police, and prosecutors cannot wait that long. The petition for certiorari details the frenetic pace at which courts are issuing *Crawford*-related decisions and the ways in which prosecutors already are creating protocols designed to exploit some courts' suggestions that "excited utterances" to governmental agents are not testimonial. *See* Pet'n for Cert. at 30-38. There simply are too many criminal convictions and future prosecutions at issue to delay at least defining the term "testimonial" and bringing some semblance of order to this area of law. *See id.*; *Gonsalves*, 833 N.E.2d at 575 (Sosman, J., concurring in part) ("As illustrated by the ever-increasing number of cases addressing confrontation clause issues in the wake of

Crawford, this is not an academic debate, but an issue of tremendous pragmatic consequence to the trial of criminal cases."); Raeder, *supra* page 3, at 27 (urging Supreme Court to take "a case in which it could clarify" *Crawford*'s application to excited-utterance accusations, because "uniformity is nowhere to be found"); Ralph Ruebner & Timothy Scahill, Crawford v. Washington, *The Confrontation Clause, and Hearsay: A New Paradigm for Illinois Evidence Law*, 36 Loy. U. Chi. L.J. 703, 775 (2005) ("One particularly troublesome area . . . is 911 calls. There is currently a disagreement among courts as to where 911 calls fit into *Crawford*'s framework.").

Indeed, when this case was in the Washington Supreme Court, the State requested an expedited oral argument, explaining that "[t]he decision in this case may impact hundreds of rulings in the district courts and the superior courts" in Washington alone. *See* Reply App. (attached to this brief) at 1. Extrapolating from the State's representation, the issue presented here may impact tens of thousands of criminal cases across the country.

The State, however, now belittles the glaring need for prompt review, asserting that this Court should turn its back on the escalating disorder in the lower courts because of two supposed deficiencies in this case's factual record: (1) the lack of evidence concerning whether "911 operators *interrogate* people who call for assistance" (emphasis added); and (2) the lack of evidence concerning the alleged victim's subjective state of mind when she told the 911 operator that Petitioner assaulted her. Br. in Opp. at 3-6 (emphasis added). The State never contended in the Washington Supreme Court that either of these topics – or any other – might require development in order to resolve completely the *Crawford* issue here, even though the Washington Rules of Appellate

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Procedure specifically provide for limited factual certifications to lower courts when "additional proof of facts is needed to fairly resolve the issues on [appellate] review" and "it would be inequitable to decide the case based solely on the evidence already taken in the trial court." Wash. R. App. P. 9.11. Nor does either supposed deficiency impede effective review now.

1. Whether 911 operators conduct "interrogations" is an artificial and irrelevant question. As the petition for certiorari explained, nothing in *Crawford* requires an interaction with a governmental agent to constitute an "interrogation" for it to produce testimonial statements. *See* Pet'n for Cert at 27-29; *see also Summers*, 414 F.3d at 1302-03 (statement testimonial even though declarant was not subject to "formal interrogation"). Even among the courts that erroneously have imposed an "interrogation" requirement, not a single one has suggested that evidence beyond that developed at a pre-*Crawford* trial was needed to resolve *Crawford*'s application to a 911 call. *See, e.g.*, Pet. App. 4-7; *Wright*, 701 N.W.2d at 811; *Ruth v. State*, 167 S.W.3d 560, 569 (Tex. App. 2005); *Leavitt v. Arave*, 383 F.3d 809, 830 n.22 (9th Cir. 2004); *People v. Corella*, 18 Cal. Rptr. 3d 770, 776 (Cal. App. 2004); *People v. Cortes*, 781 N.Y.S.2d 401, 415 (N.Y. Sup. Ct. 2004). All that is needed is the recording and transcript of the 911 call at issue.

The policy manual for the 911 call center that handled the police incident interview in this case, which the State expends so much energy discussing, does nothing more than provide background information for assessing the call itself. Parts of the manual, which is a public document, were attached to properly filed briefs in the Washington Supreme Court – both an *amicus* brief and a brief filed by the State – and that court considered them. *See* Pet. App. 9 (Sanders, J., dissenting); *see also* App. 6

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(addressing arguments in *amicus* brief).[2] The manual, thus, is part of the state court record that this Court may consider. And even if that public document had not been submitted to the court below, it is well established that this Court may "take judicial cognizance of all matters of general knowledge," *Muller v. Oregon*, 208 U.S. 412, 421 (1908), when crafting legal rules that will apply beyond the facts of a particular case. Such is the situation here; both Petitioner and the State frame the question presented in generic terms, and neither contends (for it would be silly to do so) that the issue whether an accusation to a 911 operator is testimonial depends on the attributes of any particular 911 system or any particular operator's conception of her duties. The policy manual here is simply an illustration of the general common knowledge concerning how 911 systems operate. *See, e.g., Gamble v. State*, 831 N.E.2d 178, 183 (Ind. App. 2005) ("911 calls are subject to established procedures"); *Cortes*, 781 N.Y.S.2d at 406 ("There is a regularized routine to the 911 calls in which crimes are reported.").

2. Whether the alleged victim here subjectively expected or intended her statements to be used prosecutorially likewise is irrelevant to this case. *Crawford* indicates – and all analogous areas of criminal procedure hold – that inquiries concerning

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[2] After this Court decided *Crawford*, the Washington Supreme Court called for supplemental briefing on whether the statements in the 911 call here were testimonial. Petitioner and the State filed simultaneous briefs, then WACDL filed an *amicus* brief, then the State filed another brief answering WACDL's brief. Contrary to the State's suggestion (Br. in Opp. at 3 n.1), it never filed any objection to the *amicus* brief's inclusion of pages from the manual in its appendix. The State merely included one footnote in its 24-page answering brief expressing some "doubt[]" as to whether the manual's status as a public document sufficed, in and of itself, to allow the Washington Supreme Court to consider it. Reply App. 3 (State's Answer to Brief of *Amicus* WACDL at 17 n.8). But instead of asking the Court to strike or disregard the *amicus* brief's appendix, the State simply requested that the Court "consider the related materials attached to [its] brief," consisting of other pages from the manual, if it considered the pages attached to the *amicus* brief. *Id.* In the event this Court grants certiorari, the State, of course, will be free to cite to any material in those same additional pages.

people's expectations are done on a strictly objective basis. *See* Pet'n for Cert. at 23-25; *accord Summers*, 414 F.3d at 1302. The State does not suggest any reason to depart from that rule here. Indeed, it is particularly wrongheaded to speculate on the alleged victim's state of mind when the very premise for having to do so is that the State did not produce her to testify at trial. The Washington Supreme Court majority's eagerness to undertake such an unknowable and manipulable inquiry goes to the heart of its legally erroneous analysis. *See* Pet'n for Cert. at 23-25.

This is not to say, of course, that the trial court had no warrant to determine whether the alleged victim's answers to the 911 operator's questions qualified as "excited utterances" under the Washington Rules of Evidence. *See* Br. in Opp. at 5. But the trial court's evidentiary ruling that they did so qualify does not remotely suggest, as the State would have it, that Petitioner is asking this Court to make any "finding" that is "inconsistent" with the trial court's ruling. Br. in Opp. at 5-6. Rather, the trial court's ruling – and the evidence produced at the pre-trial hearing leading to it – merely frame the issue in this Court: whether an "excited utterance" to a 911 operator accusing someone of a crime is a testimonial statement under the Confrontation Clause. *See* Pet'n for Cert. at i. In other words, Petitioner accepts that the victim's statements to the 911 operator qualified as "excited utterances" under state law; the question for this Court is whether being "under the stress of excitement caused by [an] event or condition," Wash. R. Evid. 803(a)(2), can deprive a declarant's accusatory statement to a governmental agent of testimonial status. *See* Pet'n for Cert. at 23-25.

All of the facts this Court needs to decide *that* issue are spelled out in the Washington Supreme Court opinion. A person told a 911 operator that Petitioner had just

committed a crime against her. App. 3. That person did not take the witness stand at trial. App. 3. Yet the prosecutor introduced a tape recording of the person's statements describing it as "her testimony" – to convict the defendant. App. 3, 6; *see also* Pet'n for Cert. at 4-5 (full excerpt from trial transcript). Everything else that the Washington Supreme Court speculated about in its opinion and that the State discusses in its opposition simply obscures the plain reality that conducting a "victimless" prosecution of this sort is incompatible with a constitutional right to be confronted with one's accuser. *See, e.g., Bruton v. United States*, 391 U.S. 123, 138 (1968) (Stewart, J., concurring) ("[A]n out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused.").

Finally, even on its own terms, the State's request to delay taking a post-*Crawford* case until a future Term makes little sense. If, for some reason, this Court believes additional factual development is necessary to resolving confrontation issues like the one here, the best course of action would be to grant review here and to issue an opinion as soon as possible defining "testimonial" and instructing lower courts as to exactly what facts are relevant to the testimonial inquiry. That way, litigants and courts could start working by mid-summer in evidentiary hearings to avoid errors, instead of groping for several more months or years in the relative darkness, at the risk of having to re-try an ever-mounting number of cases.

C. The Washington Supreme Court's Decision Is Emblematic Of Many Courts' Refusals To Come To Grips With *Crawford*.

Given the stark incongruity between this victimless prosecution and a right to confront one's accusers, it is worth emphasizing that the State does not even try to defend the Washington Supreme Court's decision. The petition for certiorari pointed out, among

other things, that this Court included a footnote in *Crawford* suggesting the proper approach to dealing with accusatory "excited utterances" to governmental officials. *See* Pet'n for Cert. at 27 (discussing *Crawford*, 541 U.S. at 58 n.8). Yet the State, like every state and federal court that has held that such statements are not testimonial (*see* Pet'n for Cert. at 27), simply looks the other way.

Although it may not be paramount to the State whether this and "hundreds" of other convictions it has obtained and is seeking (Supp. App. at 1) comply with the Constitution, it should matter deeply to this Court. A recent case from California, *People v. Packard*, 2005 WL 1745329 (Cal. App. July 26, 2005) (not officially published), illustrates the kinds of prosecutions that will proceed unabated until this Court acts. There, a person working at a mini-mart called 911, told the dispatcher that he had been robbed, and described the alleged robber and robbery. The caller, with no apparent justification, "refused to testify at trial." *Id.* at *2. No matter; the State proceeded with the prosecution and simply played the 911 tape for the jury. The California Court of Appeal affirmed the conviction, holding that the caller's statements were not testimonial because he "told the dispatcher he was nervous" and the 911 call "was not a police interrogation." *Id.* at *4.

This Court should not wait any longer to address the propriety of such victimless prosecutions. The common law right to confrontation and the decision in *Crawford* strongly suggest that any statement knowingly telling a governmental agent that someone committed a crime is testimonial. *See* Pet'n for Cert. at 18-29. This Court should rectify the slippage that occurred during the era of *Ohio v. Roberts*, 448 U.S. 56 (1980), and confirm that this rule prevails today.

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CONCLUSION

For the foregoing reasons, as well as those stated in the Petition for Writ of Certiorari, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 11th day of October, 2005.

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SEA 1710433v1 50062-81188

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 73893-9
	)	
vs.	)	
	)	RESPONSE TO REQUEST FOR
ADRIAN M. DAVIS,	)	ORAL ARGUMENT
	)	
Appellant.	)	
	)	
	)	
	)	

Respondent has no objection to Davis' request for oral argument in this matter. The decision in this case may impact hundreds of rulings in the district courts and the superior courts. Thus, in the interests of providing trial courts and litigants with a timely answer to the questions posed by the supplemental briefs, the State respectfully requests that this case be set for argument in May or June, rather than September.

Submitted this 3rd day of May, 2004.

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NO. [illegible]

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN M. DAVIS,

Petitioner.

ANSWER TO BRIEF OF AMICUS WACDL

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3. 911 OPERATORS ASK QUESTIONS TO FACILITATE A RESPONSE; SUCH QUESTIONING DOES NOT TRANSFORM A 911 CALL INTO A POLICE INVESTIGATORY INTERVIEW.

WACDL argues that the 911 operator in this case asked "numerous questions that have nothing to do with attempting to resolve an existing public safety problem." Br. of WACDL at 11 (quotation marks and punctuation omitted). This is simply incorrect. The operator in this case asked direct, straightforward questions regarding information that a responding police officer would need to know. Those questions did not change the government's role in any significant respect. Nor did questions of this nature change the declarant's mental state.[5]

The questions occurred in roughly the following sequence: 1) What's going on? 2) Are you in a house or apartment? 3) Are there any weapons? 4) Has he been drinking? 5) What is his name and date of birth? 6) How and in what direction is he fleeing? 7) Do you need an aid car? 8) Is this your ex-husband or boyfriend? 9) Did he force his way into

---

[5] WACDL attached selected pages of the manual to its amicus brief. Although this information is available to the public upon request, it is outside the appellate record, and it is doubtful that ER 201 permits an appellate court to take "judicial notice" of any public document. RAP 9.1, 9.11; Tegland, 5 Washington Practice: Evidence §§ 201.1, 201.17 (4th ed.). Nevertheless, if this Court is inclined to consider WACDL's appendices, Respondent respectfully asks that it also consider the related materials attached to this brief. Appendix B. Moreover, Respondent respectfully asks that this Court's decision focus on questions asked in the *existing* record, and inferences that can be drawn from the questions asked. A different case may present different facts, but this Court should eschew dicta based on hypotheticals.

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IN THE
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STATE OF WASHINGTON,

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On Petition for Writ of Certiorari to the
Washington Supreme Court

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of October, 2005, I caused to be served true and correct copies of the following documents by the method indicated below and addressed as follows:

Reply Brief for Petitioner
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DATED this 11th day of October, 2005.

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FEDERAL EXPRESS

Clerk of Court
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Re: **Adrian Martell Davis v. State of Washington**
Supreme Court of the United States, No. 05-5224

Dear Clerk:

Enclosed please find the original and ten copies of Reply Brief for Petitioner and Certificate of Service. Please return conformed copies in the prepaid envelope provided.

Thank you for your assistance in this matter.

Very truly yours,

Davis Wright Tremaine LLP

Jeffrey L. Fisher

JLF:mnb

Enclosures

cc: James M. Whisman (w/Enclosures)

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